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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2041

JACK DUCKWORTH, Petitioner

vs.

ISADORE SERRANO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondent Isadore Serrano, respectfully requests that this Court deny the petition for writ of certiorari to review the judgment, entered on March 5, 1981, of the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED

1. Whether the decision of the Seventh Circuit is in conflict with the provisions of 28 U.S.C. §2254(b) and with prior applicable decisions of this Court.

2. Whether this Court should review the Seventh Circuit's determination that the facts show that an actual conflict of interest adversely affected the performance of petitioner's attorney.

STATEMENT OF THE CASE

On February 26, 1974, an affidavit for cause and information was filed against the respondent, Isadore Serrano, charging him with two counts of First Degree Murder. A probable cause hearing was held and the Lake Superior Court, Criminal Division, found that probable cause existed for respondent's arrest. Respondent was indicted by the Lake County Grand Jury in Cause No. 374-199, said indictment being for two counts of First Degree Murder.

On April 25, 1974, the law firm of Walker and Walker entered their appearance on behalf of the respondent.

The trial commenced on June 9, 1975 and the State rested its case on June 10, 1975. Counsel for respondent proceeded with his case on June 10, 1975 and final arguments were given on June 11, 1975. The jury found respondent guilty of both counts of murder. The court sentenced the respondent to life imprisonment as to Count II and withheld sentence as to Count I.

Respondent's petition to proceed in forma pauperis before the Indiana Supreme Court was granted on March 16, 1976. On March 31, 1977 the judgment of the trial court was affirmed. Serrano v. State, 360 N.E.2d 1257 (Ind. 1977).

Respondent petitioned the United States District Court for the Northern District of Indiana for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The District Court, per Judge Sharp, denied the petition on June 8, 1979. Serrano v. Duckworth, No. S 79-74 (N.D. Ind., filed June 8, 1979). On June 18, 1979, respondent petitioned the District Court requesting a certificate of probable cause pursuant to 28 U.S.C. §2253 and F.R.A.P. 22(b). The District Court denied the petition on June 29, 1979.

The United States Court of Appeals For the Seventh Circuit granted respondent's request for issuance of a certificate of probable cause pursuant to F.R.A.P. 22(b) on May 14, 1980. Respondent was granted leave to proceed on appeal in forma pauperis and counsel was appointed to represent him pursuant to the provisions of the Criminal Justice Act.

In an opinion filed on March 5, 1981, the Seventh Circuit reversed the decision of the District Court that respondent's Sixth Amendment rights had not been violated and remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit's Decision Is Not in Conflict with Either the Provisions of 28 U.S.C. §2254(b) Or Any Applicable Decisions of This Court.

In Cuyler v. Sullivan, 100 S.Ct. 1708 (1980) this Court considered, inter alia, whether mutual representation by the same attorneys of several defendants created, as a matter of law, a violation of the Sixth Amendment. The Court held:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. In Glasser v. United States, for example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence. 315 U.S., at 72-75, 62 S.Ct. at 465-467. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." Id., at 75, 62 S.Ct., at 467. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction. (100 S.Ct. at 1718)

The Seventh Circuit, applying the Cuyler criteria, determined that respondent's attorney had an actual conflict of interest when he represented the State of Indiana's key witness while also representing the respondent. Further, the Seventh Circuit found that this conflict adversely affected the performance of respondent's counsel. In light of this clear violation the district court's decision was reversed and the case remanded.

Petitioner contends that the Seventh Circuit's decision not to delay its decision to await the state court's processing of respondent's Sixth Amendment claim is in conflict with the provisions of 28 U.S.C. §2254 and this Court's prior decisions relating to the exhaustion of state remedies. Respondent respectfully submits that even a cursory review of the authorities reveals there is no such conflict.

This Court has long recognized that judicial discretion was the concept from which the federal courts fashioned the rule of exhaustion of state remedies in habeas corpus proceedings. The exhaustion rule is not one delimiting the power of the courts but rather one which relates to the appropriate exercise of power. Fay v. Noia, 372 U.S. 391, 420 (1963). "Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles." Id. at 438. Implicit in the concepts of discretion and equity is the notion that the courts should give special consideration to special circumstances. Thus, in Frisbie v. Collins, 342 U.S. 519, (1952), this Court stated:

> As explained in Darr v. Burford, 339 U.S. 200, 210, this general rule [of exhaustion of state remedies] is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation.

Indeed, when the doctrine requiring the exhaustion of state remedies was codified in 28 U.S.C. §2254, this notion of judicial discretion was retained.[1/] 28 U.S.C. §2254 (b) provides:

* * *

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (emphasis added).

Respondent contends that there are circumstances neither more special nor which could render resort to the State of Indiana's corrective process more ineffective to protect respondent's rights than those in the present case where the Seventh Circuit has found a clear violation of the respondent's Sixth Amendment right to effective assistance of counsel.

As for petitioner's contention that the Seventh Circuits decision is contrary to the policy of comity, in an echo of

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1/ Similar provision for the exercise of judicial discretion is made in 28 U.S.C. §2243. This section provides in pertinent part:

> §2243. Issuance of writ; return; hearing; decision
>
> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith aware the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application or person detained is not entitled thereto.
>
> * * *
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (emphasis added.)

this Court's opinion in Roberts v. LaVallee, 389 U.S. 40, 43 (1967), one "...can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles."

It is respectfully submitted that to require briefing and oral argument on the merits of the petition in light of these circumstances would not be a worthwhile exercise of this Court's discretion. The petition should therefore be denied.

2. This Court Should Not Review the Seventh Circuit's Factual Determination That Respondent Was Denied Effective Assistance of Counsel.

The Seventh Circuit found that the uncontested facts show that respondent's attorney represented an important state witness while representing respondent. Petitioner urges that this Court grant its petition in order to review this finding which petitioner contends is an "erroneous determination of the facts." This contention, however, does not pass muster as a reason for allowing the writ for, as Mr. Justice Holmes wrote, this Court does "not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1924).

Petitioner seeks to evade this Court's general practice with respect to reviewing the findings of fact of lower courts by arguing that the Seventh Circuit has fashioned a per se rule. Clearly the Seventh Circuit has fashioned no such rule.

This Court held in Cuyler, supra, 100 S.Ct.at 1718, that a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his

lawyer's performance in order to establish a violation of his Sixth Amendment rights. The Seventh Circuit's review of the facts below revealed not only that respondent's attorney represented an important prosecution witness while representing respondent but also that this dual representation was without respondent's informed consent. The Seventh Circuit determined that the facts of the case met all the criteria necessary to establish a violation of the Sixth Amendment as those criteria had been identified in this Court's decision in Cuyler and later amplified in the Seventh Circuit's own decision in Magnolia Ross v. Robert Heyne and Theodore L. Sendak, 638 F.2d 979 (1980).

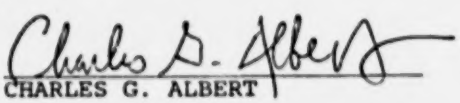
Petitioner, by excerpting a portion of one sentence from the Seventh Circuit's opinion wherein the phrase per se is used, seeks to convince this Court that the Seventh Circuit's findings of fact and conclusions of law resulted from the application of a per se rule. A review of the opinion below in its entirety plainly establishes that this argument is without merit. Accordingly, this petition should be denied.

CONCLUSION

For these reasons, respondent respectfully submits that the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be denied.

Dated: July 1, 1981.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Heard: December 10, 1980
March 5, 1981

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

Isadore Serrano, Petitioner-Appellant,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 80-1658 vs.	)	
Jack Duckworth, Respondent-Appellee.	)	No. 79-C-74 Allen Sharp, Judge.

ORDER

This is an appeal from the dismissal of a pro se petition for habeas corpus filed under 28 U.S.C. §2254.

Serrano was indicted, tried and convicted of two counts of first degree murder by the State of Indiana. He was sentenced to life imprisonment as to Count II of the Indictment. He was not sentenced as to Count I. On appeal the conviction was affirmed. Serrano v. State, 360 N.E.2d 1257 (Ind. 1977).

The trial court filed its Memorandum and Order on June 8, 1979 denying the writ. Serrano's application for an appeal, pursuant to Rule 22(b) F.R.Cr.P., was denied June 29, 1979. This Court granted Serrano's request for issuance of a certificate of probable cause. He was permitted to proceed in forma pauperis and an attorney was appointed to represent him in this Court.

Two issues are raised by Serrano:

First, his Sixth Amendment rights were violated because his attorney also represented Norma Hernandez, an important state witness, while defending Serrano.

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*/ The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

Second, there was not sufficient evidence to have found Serrano guilty beyond a reasonable doubt.

The State of Indiana contends that there was ample evidence for the jury to find Serrano guilty and in addition, Serrano has not exhausted his state remedies as required by 28 U.S.C. §2254.[1/]

After Judge Sharp had issued his Order this Court rendered its decision in Magnolia Ross v. Robert Heyne and Theodore L. Sendak, _____ F.2d _____, decided December 10, 1980. There, the Court said,

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, _____ U.S. at _____. An actual conflict would arise where defense counsel is unable to cross-examine a prosecution witness effectively because the attorney also represented the witness. United States v. Mavrick, 601 F.2d 921, 931 (7th Cir. 1979). The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. See Code of Professional Responsibility, Cannon 4 & DR 4-101(B)(2). 'The more difficult problem which may arise is the danager that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information' United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976)."

1/ §2254. State custody; remedies in Federal courts.

* * *

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Thus, it was held in Magnolia Ross that without an informed consent by a defendant dual representation of his attorney of a prosecution witness is a per se violation of such defendant's Sixth Amendment rights.

The uncontested facts here show that Serrano's attorney represented an important State witness while representing Serrano.

We find that in view of the clear violation of Serrano's Sixth Amendment rights and in the interest of judicial economy we should not delay our decision here to await the State court's processing of Serrano's claim.

We reverse the district court's finding that Serrano's Sixth Amendment rights were not violated.

In view of our determination on the Sixth Amendment issue we need not and do not decide the sufficiency of the evidence issue.

REVERSED and REMANDED for proceedings consistent with the views expressed herein.

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AFFIDAVIT OF SERVICE

I, Charles G. Albert, counsel for petitioner, on oath swear that on this 1st day of July, 1981, one copy of the Brief of Respondent In Opposition to the Petition for a Writ of Certiorari was mailed, postage prepaid to Linley E. Pearson, Esq., Attorney General of the State of Indiana, 219 State House, Indianapolis, Indiana 46204, Counsel for Petitioner. I further swear that all parties required to be served have been served.

Charles G. Albert

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Counsel for Respondent

Subscribed and sworn to
before me this 1st day
of July, 1981.

Notary Public